



EUROPEAN DATA PROTECTION SUPERVISOR

EDPS SUPERVISORY OPINION ON THE PROCESSING OF PERSONAL DATA IN THE CONTEXT OF COMPETITION LAW INVESTIGATIONS (Case 2022-0163)

1. INTRODUCTION

1. This Opinion relates to the processing of personal data in the context of an ongoing competition law investigation by the Commission's Directorate-General for Competition ('Commission') into a possible infringement by an economic operator and certain of its members under Article 101 TFEU and Article 53 of the EEA Agreement.
2. The EDPS issues this Opinion in accordance with Article 58(3)(c) of Regulation (EU) 2018/1725¹ ('the EUDPR').

2. FACTS

3. By letter of 4 February 2022, the Hearing Officer for competition proceedings of the Commission brought to the attention of the EDPS a request by an economic operator concerning the redaction of personal data included in the documents provided by the

¹ Regulation (EU) 2018/1725 of the European Parliament and the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ, L 295, 21.11.2018, p. 39.

economic operator to the Commission in the context of various Commission's requests for information pursuant to Article 18(2) of Regulation (EC) No 1/2003².

4. The Commission had launched an investigation into a possible infringement by the economic operator in question pursuant to Article 101 TFEU and Article 53 of the EEA Agreement (the prohibition of 'cartels').
5. In the context of this investigation, the economic operator provided around 2000 to 2500 pre-existing documents to the Commission, which it considered necessary to provide a reply to the Commission's request for information. The Commission also requested non-confidential versions of the documents in question, including any confidentiality claims, in order to prepare for potential access to the file requests. When the Commission receives one such request, access is granted to parties to whom the Commission may address a statement of objections (a formal step in Commission investigations into suspected violations of EU antitrust rules). The economic operator prepared non-confidential versions of the documents where it had redacted all personal data, regardless of whether they concerned its employees or employees of other entities involved. The economic operator argued that access to personal data included in the investigation file was not necessary for access to the file and the fulfilment of the rights of defence. In this vein, it claimed that the removal of personal data was necessary in order to comply with Regulation (EU) 2016/679 (the 'GDPR')³ and the EUDPR. On 23 November 2021, the Commission rejected these confidentiality claims substantiated by data protection reasons invoked by the economic operator.
6. The economic operator objected to the disclosure and referred the matter to the Hearing Officer pursuant to Article 8(2) of the Hearing Officer's Terms of Reference⁴. The Hearing Officer 'must examine any objection based on a ground, arising from rules or principles of EU law, relied on in order to claim protection of the confidentiality of the contested information'. In this regard, the Hearing Officer's preliminary assessment is that the request of confidentiality of the economic operator should be rejected.
7. The Hearing Officer argues that:

² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.01.2003, p.1.

³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, page 39.

⁴ Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, p. 29.

- a) granting access to a Commission's file is an essential procedural guarantee following the notification of a statement of objections to a party in accordance with Article 27(1) and (2) of Regulation (EC) No 1/2003 (Hearing of the parties) and Article 15 of Regulation (EC) No 773/2004 (Access to the file)⁵. Based on settled case-law, access has to be given, in principle, to the whole file and it is not up to the Commission to decide which (parts of) the documents may be relevant for the exercise of a party's rights of defence;
- b) the identification of the individuals involved on behalf of the entities under investigation could be relevant to the rights of defence, as redaction of such personal data 'could remove important context to anticompetitive exchanges';
- c) a general claim that disclosure of the personal data in question would infringe the GDPR and/or the EUDPR is contrary to the rules on the burden of proof for confidentiality claims. The burden of proof in competition proceedings is borne by the person requesting confidential treatment, i.e. the economic operator in this case;
- d) the GDPR and/or the EUDPR, as a general rule, do not prevent the Commission from including personal data in access to the file procedures, as this would interfere with competition law regulations, principles and case-law, as well as the Commission's explicit competence to enforce EU competition law in accordance with Article 105(1) TFEU;
- e) an assessment of the necessity and proportionality of access to certain (sensitive) personal data included in the documents collected by the Commission in the context of antitrust investigation may be required under the GDPR and/or EUDPR on an individual basis. In light of specific rules governing the access to the file procedure, the Commission would be entitled to presume that such necessity and proportionality requirements are met without carrying out specific, individual examinations of each document, since the disclosure of the personal data in question would be limited to the addressees of a statement of objections and since specific provisions prohibit those gaining access to the file from disclosing or using any information contained in them for purposes other than judicial or administrative proceedings for the application of Articles 101 and 102 TFEU.
8. The Hearing Officer requests the EDPS' views on the preliminary assessment or any additional aspects that would merit reflection.
9. Representatives of the Commission, including the Hearing Officer, met with the representatives of the EDPS on 17 March 2022 in order for the EDPS to obtain additional information with regard to the present request for consultation. In particular, the

⁵ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.4.2004, p. 18.

Commission and the EDPS discussed the specificities of the application of the EUDPR in competition law proceedings, the role of the Commission in the exercise of the rights of defence and the balancing of the right to the protection of personal data and rights of defence. In addition to the points raised in paragraph 7 of this Opinion, the Commission in particular noted that:

a) the applicable competition law framework requires that the names of natural persons unrelated to a given investigation be redacted and that guidance is provided to the parties in this regard, while noting that the exceptions are limited and that the Commission should, in principle, grant access to the full file;

b) it is not for the Commission to decide which information is relevant for the addressee of the statement of objections, but rather for the parties to conduct this exercise as they may find relevant information for their defence which the Commission may have disregarded;

c) the Commission is the guarantor of the rights of defence in the context of competition law proceedings in accordance with applicable case-law.

d) the economic operator in question did not submit individually substantiated confidentiality claims.

3. LEGAL ANALYSIS AND RECOMMENDATIONS

3.1. General remarks on the interplay between competition and data protection law provisions

10. Articles 7 and 8 of the EU Charter of Fundamental Rights ('the Charter') guarantee the right to privacy and protection of personal data, respectively. Article 41(2)(b) of the Charter guarantees the right to access to the file, while respecting the legitimate interests of confidentiality and of professional and business secrecy. Furthermore, the right of access to the file is a corollary of the principle of respect for the rights of defence, which form an integral part of the general principles of law⁶.

⁶ *Aalborg Portland and Others v Commission*, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, ECLI:EU:C:2004:6, para. 64 and 68.

11. Those two fundamental rights have been further elaborated by secondary Union legislation, notably the EUDPR and GDPR⁷ as regards the right to protection of personal data and Regulations (EC) No 1/2003 and No 773/2004 as regards the right of access to the file in the context of competition law investigations.
12. The EUDPR is applicable to processing of personal data by all Union institutions, bodies, offices and agencies ('EUIs')⁸. Similarly, the GDPR is applicable to processing of personal data by economic operators established in the EU/EEA alongside competition law provisions⁹.
13. Regulations (EC) No 1/2003 and No 773/2004 as well as Decision 2011/695/EU do not contain any specific language as to the protection of personal data.
14. As noted by the Commission and confirmed by case-law, since those regulations do not contain a provision expressly giving one regulation primacy over the other, the relevant provisions of the EUDPR and Regulations (EC) No 1/2003 and No 773/2004 should be applied in a manner that is mutually compatible and enables them to be applied consistently¹⁰. This allows for a fair balance to be struck between the two fundamental rights protected by the Union legal order¹¹, taking due account of Article 52(1) of the Charter.

3.2. Transmission of personal data to the Commission in the context of competition law proceedings

15. The GDPR does not, in principle, prevent economic operators from transmitting personal data to EUIs, when economic operators are under a legal obligation to provide to EUIs information that includes personal data or on a voluntary basis, as long as EUIs act within their sphere of competences.
16. The EDPS has already provided an opinion in this respect on 22 October 2018 on investigative activities of EUIs and the GDPR¹². When economic operators are under a legal obligation to provide to EUIs such information, Article 6(1)(c) GDPR would be the

⁷ In the present case applicable to the economic operator being requested to transmit personal data.

⁸ Article 2(1) EUDPR.

⁹ Article 2(a) GDPR.

¹⁰ Cf., *Commission v ENBW*, C-365/12 P, ECLI:EU:C:2014:112, para. 84.

¹¹ See e.g. *Promusicae*, C-275/06, ECLI:EU:C:2008:54, para. 68.

¹² Available at: https://edps.europa.eu/sites/default/files/publication/18-10-30_letter_investigative_activities_eui_gdpr_en.pdf

applicable lawful ground for such processing. When economic operators provide such information on a voluntary basis, Article 6(1)(f) GDPR would be applicable.

17. The EDPS has no supervisory powers over controllers or processors which are not ‘Union institutions and bodies’ within the meaning of Article 2(1) EUDPR. ‘Union institutions and bodies’ means the Union institutions, bodies, offices and agencies set up by, or on the basis of, the TEU, the TFEU or the Euratom Treaty¹³. Where economic operators are addressees of a Commission’s request for information in accordance with Union competition law, it is, in principle, for the national data protection supervisory authorities established in accordance with the GDPR to determine whether there is a legal obligation for the transmission of such personal data to the Commission.¹⁴ However, as further elaborated below, any request issued or decision taken by the Commission that requires processing, and in particular transmission, of personal data by an economic operator, possibly in compliance with a legal obligation under Article 6(1)(c) GDPR provided by competition law, should comply with the principles of necessity and proportionality in relation to the exercise of the Commission’s powers to enforce EU competition law. The collection and further processing of such data by the Commission is fully subject to the EUDPR, and in particular its Article 4. This means that the Commission as the controller may not collect personal data in a generalised and undifferentiated manner and that it must refrain from collecting personal data that are not strictly necessary for the purposes of the processing¹⁵.
18. In this regard, the EDPS highlights that such a legal obligation is to be defined in Union or Member State law provisions in accordance with Article 6(3) GDPR.
19. In conclusion, the EDPS points out that **the GDPR does not, in principle, prevent the transmission of personal data by economic operators to the Commission, in particular for the purposes of access to the file**, when such transmission is necessary for compliance with a legal obligation defined in Union or Member State law.

3.3. Transmission of personal data by the Commission to recipients in the context of access to the file

20. The EUDPR does not, in principle, prevent the Commission from including personal data as defined in Article 3(1) EUDPR in the documents disclosed in the context of access to

¹³ Article 3(10) EUDPR.

¹⁴ Articles 51 and fol. GDPR.

¹⁵ Cf. *SIA 'SS' v Valsts ieņēmumu dienests*, C-175/20, ECLI:EU:C:2022:124, para. 74.

the file, and process such personal data as defined in Article 3(3) EUDPR, when such disclosure is **necessary** for the exercise by the Commission of its competence to enforce EU competition law, in accordance with Article 5(1)(a) of the EUDPR. The exercise of such competence necessarily includes ensuring the respect of the rights of defence of the concerned parties. Processing of personal data by the Commission must therefore respect the limits to the powers imposed on the Commission by both Regulation (EC) No 1/2003 and the EUDPR¹⁶.

3.3.1. Data minimisation – Article 4(1)(c) EUDPR

21. According to the data minimisation principle enshrined in Article 4(1)(c) EUDPR, personal data are to be adequate, relevant and limited to what is **necessary** in relation to the purposes for which they are processed¹⁷. Furthermore, the controller is responsible for applying that provision and must be able to demonstrate compliance with it, as required by Article 4(2) EUDPR. Given that it is the Commission which determines the purposes and means of the processing of personal data in question, the Commission is to be regarded as ‘controller’ as defined in Article 3(8) EUDPR.

3.3.2. Transmission to recipients other than EUIs – Article 9 EUDPR

22. Moreover, Article 9 EUDPR applies to the transmission of personal data to recipients established in the Union other than EUIs. In accordance with Article 15 of Regulation (EC) No 773/2004, access to the file is granted on request and not on the Commission’s own initiative. Therefore, Article 9(1)(b) EUDPR is applicable. According to that provision, personal data are to be transmitted to such recipients only if the **recipient establishes** that it is **necessary** to have the data transmitted for a specific purpose in the public interest and the **Commission as the controller** – where there is any reason to assume that the data subject’s legitimate interests might be prejudiced – establishes that it is **proportionate** to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests.

23. While Article 9(1)(b) requires that the **recipients** establish necessity of the transmission, the EDPS acknowledges that, in principle, the addressees of the statement of objections as recipients¹⁸ are not in a position to argue why it is necessary to have the data concerned transmitted to them for a specific purpose in the public interest, since they are, prior to their access to the documents containing the personal data, normally not aware of the exact content of such documents. In addition to that, it falls on the

¹⁶ *Meta Platforms Ireland v Commission*, T-451/20, ECLI:EU:T:2020:515, para. 66.

¹⁷ See [EDPS Necessity Toolkit](#) and [EDPS Proportionality Guidelines](#).

¹⁸ Provided that they request access to the file.

Commission to ensure that the rights of the defence, and in particular the right of access to the file, of the parties concerned in the context of competition law investigations are properly respected¹⁹.

24. It is therefore necessary to interpret Article 9 EUDPR in a way that allows, in practice, for the necessity of the transmission of such personal data to be established, without impairing the exercise of the right of access to the file. Furthermore, while it is not the Commission that initiates the transmission²⁰, it must be taken into account that the Commission not only acts as the controller but also as an investigative body ensuring the respect of the rights of defence. **The EDPS therefore considers that, prior to granting of access to the file, it is for the Commission, and not for the recipient, to establish necessity of the transmission of personal data in the context of access to the file, also in view of its obligation under Article 4(1)(c) and (2) EUDPR.** This is, however, without prejudice to the recipients' possibility of establishing necessity in relation to additional personal data after having been granted access to the file.
25. In this regard, it should be borne in mind that it is settled case-law that the **confidentiality of information** for which professional secrecy requires that it be protected may also stem from the application of Articles 7 and 8 of the Charter and the EUDPR²¹.
26. This is also acknowledged by the Commission in its guidance²² according to which the names of people not involved in the infringement may be considered confidential information to the extent that they constitute personal data which cannot be transmitted.
27. In accordance with Article 16(3) of Regulation (EC) No 773/2004, the Commission may require undertakings which produce documents or statements pursuant to Regulation (EC) No 1/2003 to identify the documents or parts of the documents which they consider to contain business secrets or other confidential information, and to identify the undertakings with regard to which such documents are to be considered confidential. Moreover, the Commission may also set a time-limit within which the undertakings are to provide the Commission with a non-confidential version of the documents or statements in which the confidential passages are deleted.

¹⁹ *Hoechst v Commission*, Joined Cases 46/87 and 227/88, ECLI:EU:C:1989:337, para. 15.

²⁰ When the transmission of personal data is initiated by the controller, Article 9(2) EUDPR is applicable.

²¹ *Pergan Hilfsstoffe für industrielle Prozesse v Commission*, T-474/04, ECLI:EU:T:2007:306, para. 64., and *Evonik Degussa GmbH v Commission*, C-162/15 P, ECLI:EU:C:2017:205, para. 78.

²² [Commission Guidance on confidentiality claims during Commission antitrust procedures](#), para 12.

28. It therefore appears that as, as a rule, the burden of substantiating any confidentiality claims within competition law proceedings that could prevent the transmission of information to the addressees of the statement of objections lies with the undertaking. However, in accordance with Article 4(1)(c) and (2) EUDPR, it is the controller that is responsible for demonstrating the necessity for the transmission of personal data.
29. Therefore, in order to apply the relevant provisions in a manner that is mutually compatible, it should be borne in mind that although it cannot be solely for the Commission to determine the documents of use in the defence of the undertaking concerned, it is allowed, in accordance with settled case-law, to exclude from the administrative procedure evidence which has no relation to the allegations of fact and of law in the statement of objections and which therefore has no relevance to the investigation²³. Furthermore, the protection of confidentiality of the information covered by the obligation of professional secrecy, such as personal data, must be guaranteed and implemented in such a way as to reconcile it with the rights of defence²⁴. In the context of access to the file, it is therefore for the Commission to seek to strike a balance between those opposing interests in the light of the circumstances of each case²⁵.
30. It follows that since the Commission is allowed to exclude from the administrative procedure, and thereby from access to the file, evidence which is not relevant to the investigation, the EDPS considers that the data minimisation principle enshrined in Article 4(1)(c) EUDPR requires that the Commission exclude such evidence, in so far as it constitutes personal data, from the investigation file. The transmission of personal data that are not manifestly irrelevant to the investigation, can be considered by the Commission as necessary for the exercise of the rights of defence of the addressees of the statement of objections, without prejudice to the possibility of the recipient to establish the necessity of the transmission of additional personal data on the basis of a substantiated claim in relation to the exercise of the rights of defence.
31. As to the Hearing Officer, it appears from the case-law that this latter “must (...) examine any objection based on a ground, arising from rules or principles of EU law, relied on by the interested person in order to claim protection of the confidentiality of the contested information”²⁶.
32. Taking into account that it cannot be for the Commission alone to decide which documents are of use for the defence, implying significant and possibly insurmountable

²³ Cf. *UBS Europe and Others*, C-358/16, ECLI:EU:C:2018:715, para. 67.

²⁴ Cf. *ibid.*, para 68.

²⁵ Cf. *ibid.*, para. 69.

²⁶ Cf. *Evonik Degussa GmbH v Commission*, para. 55.

difficulty in establishing reliably the necessity of the transmission of personal data in the context of access to the file, the EDPS recommends the following:

Recommendation 1: The Commission should ensure that personal data which are manifestly not relevant to the investigation are not transmitted to the addressees of the statement of objections in the context of access to the file, regardless of whether it receives a confidentiality claim based on the right to the protection of personal data.

33. The EDPS considers that such an approach ensures that the right to protection of personal data is respected equally with regard to various data subjects. The respect of that fundamental right by the Commission cannot depend solely on the confidentiality claims, or lack thereof, of economic operators concerned.

Recommendation 2: The Commission should take due account of any confidentiality claim, in so far as it contains reasons as to why the personal data concerned are not relevant to the investigation, in its assessment whether the data are manifestly irrelevant. Such an assessment should always be documented as required by Article 4(2) EUDPR.

34. In this regard, the EDPS notes that in accordance with Article 16(1) of Regulation (EC) No 773/2004, access to the file, when so requested, is to be granted after the notification of the statement of objections. The EDPS therefore understands that the Commission's knowledge, acquired prior to and during the preparation of the statement of objections, of the evidence submitted to it in the course of the investigation facilitates its assessment whether the personal data are manifestly irrelevant.
35. Furthermore, given that the collection and other processing must be necessary for and proportionate to the exercise of its powers, the Commission might fail to comply with Article 18(3) of Regulation (EC) No 1/2003 if it does not have in place a method of verifying the relevance of documents accompanied by appropriate and specific guarantees for safeguarding the rights of the persons concerned²⁷.
36. The EDPS therefore considers that such an approach strikes a fair balance between the relevant data protection and competition law provisions, and in particular between the requirements of the necessity that must be established for the transmission of personal data and of ensuring the proper exercise of the rights of defence.
37. Furthermore, the EDPS notes that the disclosure of personal data would be limited to the addressees of the statement of objections and that, in accordance with Article 16a of

²⁷ *Meta Platforms Ireland v Commission*, para. 66 and 67.

Regulation (EC) No 773/2004, they may only be used for the purposes of judicial or administrative proceedings for the application of Articles 101 and 102 TFEU.

Recommendation 3: The Commission should give due consideration to the limited disclosure and permitted use of the personal data concerned²⁸, as well as to the purpose of their transmission, i.e. to safeguard the proper exercise of the rights of defence, and to the redaction of any personal data manifestly irrelevant to the investigation from the file prior to granting access to it, in its assessment whether the data subject's legitimate interests might be prejudiced and/or whether it is proportionate to transmit the personal data concerned, as provided for in Article 9(1)(b) EUDPR. Such an assessment should be documented as required by Article 4(2) EUDPR.

3.3.3. Special categories of personal data – Article 10 EUDPR

38. Moreover, prior to granting access to the file and when establishing the necessity of the transmission of personal data, the Commission should pay particular attention to the special categories of personal data as referred to in Article 10 EUDPR. Such personal data are, by their nature, particularly sensitive in relation to fundamental rights and freedoms and merit specific protection, as the context of their processing could create significant risks in this regard²⁹. Processing of such data therefore requires a particularly rigorous examination³⁰. The EDPS stresses that any processing of such categories of personal data may only take place if there are valid grounds for such processing, as provided for in Article 10(2) EUDPR.

3.3.4. Transfers to third countries – Chapter V EUDPR

39. In case the addressee of the statement of objections is located outside the EU/EEA, Chapter V EUDPR is applicable in the context of access to the file.

Recommendation 4: The Commission should ensure compliance with Chapter V EUDPR where the addressee of the statement of objections is located outside the EU/EEA, including by adopting any supplementary measures that may be required in order to ensure an essentially equivalent level of protection³¹.

²⁸ See paragraph 37 of this Opinion.

²⁹ Recital 29 EUDPR.

³⁰ *XI v Commission*, T-528/18, ECLI:EU:T:2019:594, para. 67.

³¹ See also [EDPB Recommendations 01/2020 of 18 June 2021 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data, version 2.0.](#)

3.4. Transparency obligations

40. The EDPS letter of 22 October 2018 on investigative activities of EUIs and the GDPR as well the EDPS Opinion of 17 December 2021 on the interpretation of Article 3(13) EUDPR in the context of the information provided to data subjects pursuant to Articles 15 and 16 EUDPR and restrictions under Article 25 EUDPR³² remain valid. They provide guidance concerning the transparency obligations of EUIs, including where they exercise their investigative powers and apply their internal rules concerning the processing of personal data³³.

Recommendation 5: The Commission should take into consideration the guidance included in the aforementioned documents³⁴ when providing information to data subjects in accordance with Articles 14-16 EUDPR.

4. CONCLUSION

41. The GDPR and/or EUDPR are fully applicable in the context of competition law proceedings. The present Opinion includes EDPS recommendations to the Commission to ensure compliance of processing of personal data in the context of competition law proceedings, and in particular access to the file, with the EUDPR.
42. In light of the accountability principle, the EDPS expects the Commission to implement the above recommendations accordingly and has decided to **close the case**.

Done at Brussels on 20/05/2022

(e-signed)

Wojciech Rafał WIEWIÓROWSKI

³² Available at: https://edps.europa.eu/system/files/2022-01/21-12-17_edps_opinion_article_313_en.pdf.

³³ E.g. Commission Decision (EU) 2018/1927 of 5 December 2018 laying down internal rules concerning the processing of personal data by the European Commission in the field of competition in relation to the provision of information to data subjects and the restriction of certain rights, OJ L 313, 10.12.2018, p. 39.

³⁴ See paragraph 40 of this Opinion.